

Lo (Migration) [2020] AATA 3415 (26 June 2020)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Kai Kin Peter Lo
CASE NUMBER:	2002076
HOME AFFAIRS REFERENCE(S):	BCC2019/3444115
MEMBER:	Vanessa Plain
DATE:	26 June 2020
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Statement made on 26 June 2020 at 3:30pm

CATCHWORDS

MIGRATION – cancellation – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – circumstance no longer exists – relationship ceased – member of the family unit – applicant pursuing study options – separation from applicant's child – family law proceedings – Intervention Order – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 116
Migration Regulations 1994, Schedule 8 Condition 8516; r 1.12

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 24 January 2020 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 500 (Student) visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) of the Act on the basis that a circumstance which permitted the grant of the visa no longer exists. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 22 June 2020 to give evidence and present arguments.
4. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

5. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the grounds set out in s.116(1)(a) of the Act. If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

Ground for cancellation

The ground for cancellation considered in by the delegate was as follows:

Section 116 - Power to cancel

- (1) Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:
 - (a) *The decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists;*
 - (2) The Minister is not to cancel a visa under subsection (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.
 - (3) If the Minister may cancel a visa under subsection (1), (1AA), (1AB) or (1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.
6. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.

7. Particulars of the ground for cancellation

8. Information before the Department appeared to indicate that the applicant was no longer in a relationship with Ms Hui Leng Helena Ng (**Ms Ng**).
9. The applicant's visa was granted because the application met, among other criteria, the secondary criteria for the visa on the basis that the applicant was a member of the family unit of Ms Ng, as prescribed by paragraph (2)(a) of regulation 1.12 of the *Migration Regulations 1994* (the Regulations), which provides as follows:

- (2) *A person is a member of the family unit of another person (the family head) if the person:*
(a) *is a spouse or de facto partner of the family head; or*

To be a member of the family unit of Ms Ng as prescribed by reg 1.12(2)(a), the applicant needed to continue to be either a spouse or de-facto partner of that person as defined respectively by sections 5F and 5CB of the Act, which state (in part):

s5F 'Spouse'

- (1) *For the purposes of this Act, a person is the spouse of another person (whether of the same sex or a different sex) if, under subsection (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of subsection (1), persons are in a married relationship if:*
(a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
(b) *they have a mutual commitment to a shared life as a married couple to the exclusion of all others; and*
(c) *the relationship between them is genuine and continuing; and*
(d) *they:*
(i) *live together; or*
(ii) *do not live separately and apart on a permanent basis. 1...]*

s5CB 'De facto partner'

De facto partners

- (1) *For the purposes of this Act, a person is the de facto partner of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.*

De facto relationship

- (2) *For the purposes of subsection (1), a person is in a de facto relationship with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:*
- (a) they have a mutual commitment to a shared life to the exclusion of all others; and*
 - (b) the relationship between them is genuine and continuing; and*
 - (c) they:*
 - (i) live together; or*
 - (ii) do not live separately and apart on a permanent basis; and*
 - (e) they are not related by family (see subsection (4)).*
- 1...]*

10. The applicant was granted the secondary visa on the basis that he was a member of the family unit of the primary visa holder as he was in a genuine and continuing relationship with Ms Ng. Information before the delegate indicated that the applicant ceased to be either a spouse or a de-facto partner of that person. It therefore appeared that the applicant ceased to be a member of their family unit as prescribed by reg 1.12(2)(a).
11. Based on this information, there appeared to be grounds for cancelling the applicant's visa under s 116 (1)(a) of the Act because it appeared that a circumstance which permitted the grant of the visa no longer existed.
12. On 17 December 2019 the applicant was sent a Notice of Intention to Consider Cancellation of visa. He responded in writing on 23 December 2019. He admitted that there are grounds for cancellation and provided the following reasons, as summarised by the Delegate:
 - 'The visa holder's spouse terminated their relationship on 30 May 2019, taking their infant child.'
 - 'An intervention order was served on the visa holder on 2 June 2019 by the police, preventing him from contacting his family.'
13. At the hearing, the applicant acknowledged that he and his wife have been separated for a year and that he has a hearing in the Federal Circuit Court of Australia on 13 August 2020, which is a final hearing to determine property and custody of a 3 year-old child, that they have not lived together since February 2019 and that they have not reconciled.
14. On the basis of the above evidence, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists, because the applicant is no longer a member of the family unit as prescribed by regulation 1.12 and therefore the circumstance for which the visa was granted no longer exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

15. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
16. The applicant provided reasons for why his visa should not be cancelled, as summarised by the Delegate (verbatim) as follows:
 - He has been considering study pathways to benefit his career and assist his family.
 - He is seeking employment opportunities and performs volunteer work through the Salvation Army.
 - The visa holder sought psychiatric treatment for stress management in July 2018.
 - The visa holder has been attending programs for family violence prevention and to improve his parenting skills.
 - He wants to continue to be present in his son's life and build a meaningful relationship with him. The applicant is in regular contact with his son.
 - The visa holder has been abiding by his visa conditions and obeying Australian laws.
 - He wants to stay in Australia while any divorce proceedings occur or at least until a final hearing date on 13 August 2020, as he is not formally divorced.

17.

18. Purpose of applicant's travel to and stay in Australia

19. The Delegate's decision record states as follows:

20. 'The visa holder first arrived to Australia on 14 March 2006 as the primary holder of a Student (subclass 573) visa in order to complete higher education in Australia, and was granted three subsequent Student (subclass 573) visas throughout his stay. Information available to the Department indicates that the visa holder obtained a Bachelor of Marine Science at University of Tasmania (UTAS) and a Bachelor of Marine Science with Honours at Institute for Marine and Antarctic Studies, UTAS while holding Student visas.'

21. 'On completion of his studies, the visa holder was granted a Temporary Graduate (subclass 485) visa on 05 September 2012 for the purposes of living, working and studying in Australia. The visa holder departed Australia while holding this visa on 4 March 2014, and returned on an Electronic Travel Authority (subclass 601) visa on 12 August 2017. There is no information before me to indicate that the visa holder's travel to and stay in Australia on these various subclasses was in contravention of the purposes of their grant.'

22. On 3 April 2018, the applicant was granted a Student (TU 500) visa as a dependent (spouse) for the purpose of being able to accompany and remain in Australia temporarily with the primary visa holder Ms Ng with whom he was married.
23. The Department was notified that the visa holder ceased to be in relationship with Ms Ng, which the applicant, in his evidence as above, admitted occurred in approximately May 2019.

24. As the applicant has ceased to be the spouse of the primary visa holder, the Tribunal considers that the purpose for which the visa was granted has ended and there is no legitimate immigration reason for the applicant to continue to hold the dependant student visa.
25. The Tribunal affords this consideration weight in favour of cancelling the visa.
26. The extent of compliance with visa conditions
27. There is no evidence before the Tribunal to suggest that the applicant has breached any of his visa conditions that applied to his previous visas. However, the applicant is in breach of condition 8516, as he is no longer a person who satisfies the secondary criteria for the grant of the visa.
28. The Tribunal gives this consideration a little weight against cancelling the applicant's visa.
29. The degree of hardship that may be caused to the visa holder and any family members
30. The applicant informed the Tribunal that desires to remain in Australia for the purpose of being able to continue to see his son and see to the finalization of the family law proceedings in the Federal Circuit Court of Australia in August 2020. The Tribunal is mindful that a cancellation of the visa will possibly impede upon the applicant's capacity to see his son, however, critically, a cancellation under s.116(1)(a) of the Act does not cause a visa holder to be affected by the Public Interest Criterion 4013. Therefore, the applicant will not be prevented from applying and being considered for a new visa which suits his need to remain in Australia for the purpose of seeing his son (provided he is able to meet all the relevant criteria for any visa he applies for).
31. The Tribunal acknowledges the applicant's claims that he wishes to go back to do further study to benefit his career and to do further volunteer work. The Tribunal acknowledges that a cancellation outcome may impact the applicant's capacity to study further in Australia and perform volunteer work. However, there is no evidence before the Tribunal to the effect that the applicant could not achieve these objectives outside of Australia if he is required to depart the country.
32. The Delegate noted that the applicant stated 'that he has previously sought psychiatric treatment for stress management which impacted on the breakdown of the relationship between him and his spouse.' This issue was not pressed at the hearing, however, the Tribunal acknowledges the applicant's claims that he has engaged in rehabilitation services to address these issues.
33. The Tribunal acknowledge that the applicant will suffer some hardship gives this consideration some weight against cancelling the visa.
34. The circumstances in which the ground for cancellation arose
35. The grounds for cancellation arose when the applicant ceased to be in a continuing relationship with the primary visa holder, his spouse, Ms Ng.
36. Taking into account the evidence of the applicant at hearing and the matters raised by him in his response to the NOICC, the Tribunal cannot be satisfied that there are extenuating circumstances in this case that were beyond the applicant's control that led to the ground for cancellation arising.

37. The Tribunal affords this consideration significant weight in favour of cancelling the visa holder's
38. The visa holder's past and present behaviour towards the Department
39. The applicant responded promptly to the NOICC and there is no evidence before the Tribunal to suggest that the applicant has been uncooperative with the Department or departmental staff.
40. The Tribunal gives this consideration a little weight against cancelling the visa.
41. Whether there are any persons in Australia whose visas would, or may, be cancelled under s140
42. The circumstances of this case are not such that any person's visa would be consequentially cancelled under s140 of the Act. The Tribunal therefore does not give this factor any weight for or against a decision to cancel the visa for this consideration.
43. Legal consequences of a decision to cancel the visa
44. If the visa is cancelled, the applicant will become an unlawful non-citizen and may be liable for detention under section 189 and removal under section 198 of the Act if he does not voluntarily depart Australia. The applicant would also be affected by section 48 of the Act, which may prevent him from applying for certain visas while in Australia.
45. The applicant will be eligible to apply for a Bridging Visa E, may allow him to remain in Australia momentarily while he resolves his personal circumstances.
46. The cancellation of the applicant's visa is not subject to Public Interest Criterion 4013, which would otherwise exclude him from being granted a visa for a specific period of time in the future. By contrast, the applicant would be eligible to apply and be granted further visas without penalty, should he meet the required criteria.
47. These are mandatory and intended consequences of the legislation and given that the circumstances giving rise to the breach were not due to extenuating circumstances beyond the control of the applicant, the Tribunal does not consider this to be manifestly unfair and the Tribunal therefore gives this consideration some weight in favour of cancelling the visa.
48. Australia's international obligations
49. The applicant and his wife share a three year-old son and they are currently the subject of proceedings before the Federal Circuit Court of Australia scheduled for final hearing in August 2020. The child is dependent upon Ms Ng's Student (subclass 500) visa.
50. Relevant Departmental policy instructions (Procedural Advice Manual 3) relating to family separations states (at [76]) as follows:
51. "Obligations apply to persons within Australia's territory and also to persons within Australia's jurisdiction. The obligations that are most relevant to the cancellation process are those relating to the best interests of the child, family unity and non-refoulement (this latter term refers to an obligation that people should not be removed to frontiers/territories where they face certain types of harm)..."

52. Australia is a signatory to the *Convention on the Rights of the Child* (CROC) and the *International Covenant on Civil and Political Rights* (ICCPR). Article 3.1 of the CROC provides as follows:
53. “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.”
54. Australia is also a signatory to the *International Covenant on Civil and Political Rights* (ICCPR). Article 23.1 of ICCPR provides as follows:
55. “The family is the natural and fundamental group unit of society, and is entitled to protection by society and the State...”
56. Taking into account the aforementioned covenants and Departmental policy, the Tribunal acknowledges that the family unit of the applicant, his wife and their son is a significant consideration and that cancellation of the visa may result in some physical separation of the applicant from his child.
57. However, the Tribunal notes that the applicant is currently separated, to a degree, from his son as a result of an Intervention Order served upon him by the Police in August 2019. The applicant informed the Tribunal that he consented to the Intervention Order without admission when he attended upon the Magistrates Court some time between June – August 2019.
58. It is unclear to the Tribunal whether the Intervention Order remains in place, as the applicant did not provide a copy of it to the Tribunal. However, the Tribunal takes into account the applicant’s claims that notwithstanding the Intervention Order, he has supervised visits with his son as a result of a psychological assessment the applicant and his wife were ordered to undertake as a result of the family law proceedings in the Federal Circuit Court of Australia. The outcome of that assessment recommended that the applicant be supervised by a maternal health nurse during visitation with his son.
59. While the Tribunal acknowledges that a cancellation may result in the physical separation of the applicant from his child, the Tribunal notes that family unity is already disrupted due to the existence of the Intervention Order and the cancellation of the applicant’s visa will not result in a separation of the child from his primary guardian, being Ms Ng.
60. The Tribunal affords this consideration little weight against cancelling the visa.
61. Any other relevant matters
62. There are no other relevant matters to take into consideration.
63. Although the matters set out above do not reveal any bad faith on the part of the applicant, it is clear based on all the evidence set out above, that the reason for the breach of the visa condition was not due to extenuating circumstances beyond the control of the applicant.
64. It is also clear that the considerations I have arrived at, on examining and weighing all the evidence before me, lean towards the visa being cancelled and I so find.
- Considering the circumstances as a whole, the Tribunal concludes that the visa should be cancelled.

DECISION

65. The Tribunal affirms the decision to cancel the applicant's Subclass 500 (Student) visa.

Vanessa Plain
Member